IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO. 180 OF 1999

SHOBHA @ SUMAN RAGHUNATH GHADGE)
R/o Marloshi, Tal. Pathan)
Dist. Satara) .. APPELLANT

VERSUS

STATE OF MARASHTRA) .. RESPONDENT

WITH

CRIMINAL APPEAL NO. 181 OF 1999

RAGHUNATH DOULATI GHADGE)
R/o Marloshi, Tal. Pathan)
Dist. Satara) .. APPELLANT

VERSUS

STATE OF MARASHTRA) .. RESPONDENT

Mr. Rahul Kate for appellants
Mr. K. V. Saste, APP

CORAM:-SMT. RANJANA DESAI &
D. G. KARNIK, JJ.
DATED:- 6/3/2006

ORAL JUDGMENT: (Per Ranjana Desai, J.)

. In these two appeals the judgment and order

dated 31/3/99 passed by the IVth Additional Sessions Judge, Satara, at Satara in Sessions Case No. 12 of 1998 is challenged.

2. Criminal Appeal No. 180 of 1999 is preferred by Shobha @ Suman Raghunath Ghadge, original accused 2 and Criminal Appeal No. 181 of 1998 is filed by Raghunath Daulati Ghadge, original accused 1 (For the sake of convenience we shall refer to the appellants as per their description in the trial court). The accused were charged under Section 452, 302, 323 r/w 34 of the IPC for having committed trespass in the house of deceased, Shobha Kisan Ghadge and for having set her on fire by pouring kerosene on her and committing her murder in furtherance of their common intention.

3. The case of the prosecution is that on the day prior to the incident in question at about 1 p.m. near the public water tap there was a quarrel between daughter of accused 2 and daughter of the deceased. PW 3 Jijabai who had come there told them not to quarrel and she went away. On the same day at about 5 p.m. the accused were again quarrelling with the deceased near the house of the accused. PW 3 Jijabai saw accused 1 and 2 beating

the deceased. PW 4 Vimal, the sister of PW 2 Tatyaba was also there. She also tried to intervene. There was a scuffle. PW 4 Vimal, Banubai and others intervened and rescued the deceased.

4. According to the prosecution at about 1 to 1-30 p.m. on 10/10/1997 PW 2 Tatyaba, the brother-in-law of the deceased was in his house. He heard commotion from the house of the deceased. He rushed there. He found that the house was latched from outside. His sister Vimal and Banubai were also there. Tatyaba tried to open the door by kicking it. However, he found in the torch light that the door was latched from outside. He removed the latch and went inside. He found that the deceased was in flames. His sisters put blanket on the deceased. The fire was extinguished. Deceased was brought in the veranda. According to the prosecution the deceased told Tatyaba that accused 1 and 2 had poured kerosene on her and set her on fire. Tatyaba went to Bambavade and he brought the jeep. The deceased was shifted to Civil Hospital, Satara.

5. On 9/10/97 A.S.I. Hanmant Shinde was on duty

at Satara City Police Station. He received information from the doctor that a lady had sustained burn injuries and was admitted in the hospital. He then took Yadi from the doctor and proceeded to make inquiry with the patient. He took the doctor with him. The doctor examined the deceased and found that the patient was in a fit condition to make statement. Accordingly A.S.I. Shinde recorded her statement between 7 a.m. to 7-30 a.m.

6. It is the case of the prosecution that in this statement the deceased disclosed that on the night of 9/10/97 she was sleeping in her house. Kerosene was poured on her. She woke up from her sleep when her clothes started burning. At that time she saw accused 1 and 2 who had poured kerosene on her and set her on fire running away. Exhibit 33 was treated as F.I.R. and investigation started on the basis of the same.

7. PW 8 Baburao Mohite, Executive Magistrate was contacted. He came there. He met medical officer PW 7 Dr. Deshpande and asked him whether the deceased was in a fit condition to give the statement. Dr. Deshpande opined that the deceased

was in a conscious state and in a fit condition to give statement. He then took down the statement which is at Exhibit-38. This statement was recorded between 11-25 a.m. to 11-45 a.m. on 9/11/97. In this statement the deceased reiterated that accused 1 and 2 had poured kerosene on her and set her on fire and she saw this while they were running away.

8. PW 9, Shivaji Bhosale is the investigating officer. According to him on 11/10/97 he recorded the statement of the deceased. It is at Exh. 40. In this statement the deceased has stated that on 9/10/97 at about 1 a.m. the accused poured kerosene on her and set her on fire. At that time she pushed the children aside by giving a kick to ensure that they do not get burnt.

9. The deceased succumbed to the burn injuries on 13.10.97. Postmortem was done on the corpse of the deceased by PW 5 Dr. Jadhav According to the postmortem notes the deceased had sustained 56% superficial to deep burns. Dr. Jadhav opined that the death was due to septicemia following 56% superficial to deep burns. Spot panchnama was drawn. The accused were arrested. After

completion of the investigation the accused came to be tried as aforesaid.

10. In support of its case the prosecution examined as many as nine witnesses. PW 2 Tatyaba Ghadge, PW 3 Jijabai and PW 4 Vimal Ghadge had rushed to the scene of offence after they heard the commotion. PW 6 A.S.I. Hanmant Shinde who was on duty at the Civil Hospital, Satara on 9.10.97 has deposed about dying declaration Exh. 33 recorded by him. PW 8 Executive Magistrate Baburao Mohite has deposed about dying declaration Exhibit 38 which was recorded by him. PW 9 P. I. Shivaji Bhosale is the investigating officer. He has given the details of investigation. He has deposed about dying declaration Exh. 40 recorded by him. Medical evidence consists of the evidence of PW 5 Dr. Shankar Jadhav and PW 7 Dr. Jayant Deshpande.

11. The accused claimed to be innocent. They filed written statements. According to the accused there are two groups in Patan taluka. On group supports one Vikramsinh Patankar and the other group supports one Shamburaj Desai, who is the chairman of milk dairy. The accused support Patankar whereas the deceased, witness Tatyaba and

others belong to the group of Shamburaj Desai. Witness Tatyaba is the chairman of the milk society and the accused are the members of the said society. The accused and their leaders were attempting to take charge of the milk society and, therefore, there was political rivalry between the two sides. According to the accused they have been falsely involved because of this rivalry. They denied the prosecution case and claimed to be tried.

12. After perusing the evidence on record the learned Sessions Judge came to the conclusion that the prosecution had proved its case beyond reasonable doubt. He, therefore, convicted the accused under Section 452 read with 34 of the Indian Penal Code and sentenced them to suffer R.I. for two years and to pay fine of Rs.200/- each, in default to suffer R.I. for one month. He convicted the accused for the offence punishable under Section 302 read with 34 of the Indian Penal Code and sentenced them to suffer imprisonment for life and to pay fine of Rs.500/- each, in default to suffer R.I. for one year. The substantive sentences were ordered to run concurrently.

13. Being aggrieved by the said judgment and order, the accused have preferred the instant appeals.

14. Mr. Rahul Kate, the learned counsel for the accused submitted that there are serious discrepancies in the dying declarations of the deceased and, therefore, it is extremely risky to rely on them. He submitted that in such circumstances corroboration from other evidence was necessary, but it is lacking in this case. Apart from the dying declarations there is no other evidence which can connect the accused to the crime. The learned counsel urged that the accused have been falsely implicated in this case on account of rivalry between two groups. According to the learned counsel the prosecution story is inherently improbable and hence the accused deserve to be acquitted.

15. Mr. Saste, the learned APP on the other hand contended that it is well settled that conviction can rest on an uncorroborated dying declaration. He submitted that in this case the dying declarations are consistent. The Special Executive Magistrate has no reason to falsely implicate the

accused. The learned APP pointed out that the doctor has clearly stated that the deceased was in a fit mental and physical condition to make a statement. In such circumstances there is no reason to discard the dying declarations. The learned APP urged that the prosecution has proved its case beyond reasonable doubt and hence the impugned judgment and order deserves to be confirmed.

16. In this case there are no eye-witnesses. The case entirely rests on dying declarations of the deceased. It is well settled that a conviction based upon an uncorroborated dying declaration is legal. Dying declaration can form the sold basis of conviction. But the court must be satisfied that it is true and voluntary. The court must be satisfied that it is not the result of tutoring, prompting and imagination and that the deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. A dying declaration recorded by a competent Magistrate in a proper manner in the form of questions and answers and in the words of the maker as far as practicable - stands on a much higher footing than a dying declaration which depends on

oral testimony which may suffer from all the infirmities of human memory and character.

17. **In Khushal Rao v. State of Bombay, AIR 1958 SC 22**, the Supreme Court has observed that in order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation i.e. whether there was sufficient light, if the crime was committed at night, whether the capacity of the man to remember the facts stated had not been impaired at the time of making the statement, that the statement has been consistent throughout, if he had several opportunities of making dying declaration apart from the official record of it, and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

18. A dying declaration stands on the same footing as any other piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weight to be attached to evidence.

19. In case of plurality of dying declarations if

there are glaring inconsistencies in them no conviction can rest on them. The present dying declarations will have to be examined in the light of above principles.

20. The first dying declaration Exh. 33 is recorded by PW 6 ASI Hanmant Shinde who was on duty at the Civil Hospital on 8.10.97 from 8 p.m. to 8 a.m. next day. This dying declaration was recorded between 7 a.m. to 7-30 a.m. on 9.10.97 at the Civil Hospital, Satara. PW 6 Shinde has stated that on 9.10.97 he received information that a lady who had sustained burn injuries was admitted in the hospital. He called the doctor and asked him to examine the lady. Doctor informed him that the lady was conscious and was fit to give statement. He then recorded the statement of the deceased. He read over the statement to the deceased. The deceased admitted the contents thereof. Then thumb impression of the deceased was obtained on the statement. Doctor’s endorsement was also obtained. PW 5 Dr. Jadhav has confirmed that he had examined the deceased and found her to be conscious and well oriented. He has stated that the police recorded the statement of the deceased in his presence and he had made the necessary

endorsements on the same. It is pertinent to note that neither PW 6 ASI Shinde nor PW 5 Dr. Jadhav have stated what statement was made by the deceased.

21. In this first dying declaration the deceased has referred to an incident which had taken place at 5 p.m. on 8/10/97. She has stated that at that time the accused were beating her daughter Laxmi. When she asked them why they were beating her daughter, they beat her also and also warned her. She has further stated that thereafter she finished her domestic work, had dinner and was sleeping in the house along with her children. When she was asleep, on 9.10.97 at about 1 a.m. rockel was poured on her and she was set on fire. When her clothes were burning she woke up from her sleep screaming. At that time she saw the accused who had poured kerosene on her and set her on fire running away. Because of her screaming her sister-in-law Banubai came and put blanket on her. Then her sister-in-law and brother-in-law Tatyaba took her to Government dispensary in a jeep, where she was treated. Thereafter she was taken to Satara Civil Hospital.

22. In this dying declaration the deceased has said that rockel was poured on her and she was set on fire and when her clothes started burning she woke up. Therefore, when the rockel was poured and she was set on fire she was asleep. It is only when her clothes started burning that she woke up and at that time she saw the accused who had poured rockel on her and set her on fire running away. It is clear, therefore, that the deceased had not seen the actual pouring of rockel and setting her on fire by the accused. According to her she saw them while they were running away. Therefore, even if as stated by PW 5 Dr. Jadhav and PW 6 Hanmant Shinde the deceased was in a fit condition to make a statement, this statement does not lead to the conclusion that the deceased had seen the accused pouring rockel on her and setting her on fire.

23. The second dying declaration is Exh. 38 recorded by Special Executive Magistrate. PW 8 Baburao Mohite. He has stated that on 9.10.97, he went to the Civil Hospital, Satara at about 11-15 a.m. on being requested by the police. He went along with the doctor to the burn ward. Doctor told him that the deceased was conscious after examining her. He then recorded her statement and

read it over to her and obtained her thumb impression on the same. He also obtained the certificate of the medical officer that the deceased was conscious during recording of the statement. He then signed the statement. PW 7 Dr. Jayant Deshpande has confirmed that he had examined the deceased and told PW 8 Baburao Mohite that the deceased was conscious and was fit to give statement. He has confirmed that he had made the necessary endorsements on dying declaration Exh. 38. It is pertinent to note that neither PW 7 Dr. Deshpande nor PW 8 Baburao Mohite have stated in court what statement was made by the deceased.

24. In this second written dying declaration the deceased has referred to the earlier incident in which she and her daughter were beaten up by the accused on 8.10.97. She has further stated that on the night of 8.10.97 she was sleeping in her house along with her children. At that time the accused poured rockel on her and set her on fire. She has further stated that she saw this with her eyes when they were running away. Thereafter she was brought to the Government dispensary and to the Civil Hospital, Satara by her brother-in-law Tatyaba and her cousin.

25. In this dying declaration also though the deceased says that the accused poured rockel on her and set her on fire she has added that she saw this while they were running away. It is not possible for the deceased to see the accused pour rockel on her and set her on fire if she saw them only when they were running away. In this dying declaration also there is no categorical assertion that she saw the accused actually pouring kerosene on her and setting her on fire.

26. The third dying declaration is recorded much later that is on 11.10.97 by PW 9 P.I. Shivaji Bhosale. It is at Exh. 40. In this statement a completely new story is found. The deceased has referred to the earlier incident which had taken place at 5 p.m. on 8.10.97. Then she has said that in the night of 8.10.97 at about 11 p.m. she and her children came home from the temple. She has further stated that because her children are young and the lame she-goat used to sit near the door she never used to lock the door from inside. She had just pushed the door and she was sleeping. At about 1 p.m. the accused poured rockel on her and set her on fire and because her children should

not catch fire she pushed them aside by her leg. When she caught fire and started screaming accused 1 who had a can in his hand dropped it in the house and he ran away. She has further stated that the seized can is shown to her and it is the same can which was in the hand of accused 1 and it belongs to him.

27. In our opinion, Exh. 40 is a completely doctored document. The story that the deceased never used to lock the house; that a she-goat used to be tethered at the door, that can was dropped by accused 1 in the house is introduced by the prosecution obviously to fill in the lacunae. It is a completely new story which in our opinion instead of helping the prosecution damages it's case. The deceased was a widow. She had two children. It is inconceivable that at night she would keep the door open and sleep. The prosecution has come out with the story that the door of the deceased was latched from outside. PW 2 Tatyaba who is admittedly staying in the adjacent house heard commotion at 1 to 1-30 a.m. and came there. He kicked the door but the door did not open. He saw in the torch light that the door was latched from outside. He removed the latch,

entered the house and found the deceased in flames. It is obvious that in order to make this case probable in dying declaration Exh. 40 a new story is created that the deceased used to keep her door open at night. PW 4 Vimal has also tried to support this story by saying that the deceased never used to latch her door as she used to tether her she-goat and she-buffalo in the verandah. This story is inherently improbable. This is created only to lend support to the prosecution story that the accused entered the house, burnt the deceased to death by pouring rockel on her and locked the door from outside and ran away. If the accused were to break the door Tatyaba and others would have heard the noise and come to the spot immediately. The spot panchnama does not say anything about the condition of the latch. Therefore, it is not clear how the incident had taken place. But the story introduced in the third dying declaration that the deceased used to keep her door open at night does not stand to reason and creates doubt about the prosecution story.

28. The deceased is also supposed to have said in this third dying declaration that when the accused poured rockel on her she pushed aside her children

who were sleeping there by her leg to ensure that they should not get burnt. The prosecution has not examined the children. Not a single witness has stated what happened to the children. If their mother was set on fire and was screaming, the children would have definitely woken up and started screaming. If the deceased had pushed them by her leg they would have certainly woken up from sleep. No witness has stated that they were crying or were removed from there. If rockel was poured on the deceased and her children were sleeping so near her that she had to push them aside to save them, it is inconceivable that rockel would not fall on them or that they would not receive burn injuries. There is no explanation offered by the prosecution as to what happened to the children. This creates doubt as to whether the children were in fact in the room and whether the incident occurred in the manner in which the prosecution is alleging that it has occurred. This is a great lacuna in the prosecution case.

29. It is also pertinent to note that in the third dying declaration the deceased has said that accused 1 dropped rockel can in the room and he ran away. She is supposed to have identified the can

when it was shown to her as the same can belonging to accused 1. This story is also absent in the first two dying declarations. In first two dying declarations the deceased has stated that she saw the accused while they were running away. In the third dying declaration, therefore, the prosecution has tried to make an improvement. There is a great variance between the first two dying declarations and the third dying declaration. The third dying declaration Exh. 40 will, therefore, have to be kept out of consideration.

30. Even if it is accepted that the deceased was in a fit mental and physical condition to make the first two dying declarations and that they are consistent, all that these statements say is that the deceased saw the accused while they were running away. She has stated that she was sleeping. When rockel was poured on her and she started burning she woke up and saw the accused who had set her on fire running away. She has not stated that she actually saw the accused pour rockel on her and set her on fire.

31. There is one more important aspect of the case which needs to be mentioned. PW 2 Tatyaba has

stated that he kicked the door but the door did not open. In the torch light he found that the door was locked from outside. Therefore, there was no light at the scene of offence. There is no clear indication in the record that there was light at the scene of offence. If as stated by the deceased she saw the accused while they were running away it is difficult to hold that she could have identified them from their backs. If there was darkness identification of the accused by the deceased as the persons who poured rockel on her, in the circumstances of the case, appears to be difficult. Therefore, even if, we accept the first two dying declarations to be voluntary and made when the deceased was in a fit mental and physical condition, on the basis thereof, it cannot be held that the accused poured rockel on the deceased and set her on fire because she has not categorically so stated and because considering the position of light it was not possible for the deceased to identify them. The deceased had no adequate opportunity to see the accused. We are unable to accept the trial court’s reasoning that the deceased must have seen the accused in the light of fire.

32. According to the prosecution the deceased also made oral dying declaration to PW 2 Tatyaba, PW 3 Jijabai and PW 4 Vimal who had gone to her house after hearing commotion. The deceased is said to have told these witnesses that the accused poured rockel on her and set her on fire. Admittedly these witnesses are related to the deceased. They are interested witnesses. The prosecution has failed to examine any independent witness. In the absence of any corroboration from other evidence on record it is difficult to believe these witnesses as regards oral dying declarations. Besides, if there was no visibility and the deceased had seen the accused while they were running away as stated by her in her written dying declarations then her identification of those who poured rockel on her and set her on fire itself becomes doubtful. It is, therefore, not possible to place reliance on the alleged oral dying declarations.

33. The prosecution has also tried to prove motive. It is the case of the prosecution that prior to the incident in question on two occasions there was a quarrel between the deceased and the accused on account of some bickering between the daughter of the deceased and the daughter of

accused 2 at 1 p.m. and 5 p.m. At 5 p.m. the accused had beaten the deceased. PW 2 Tatyaba does not speak about it. PW 2 Jijabai has admitted in her evidence that she did not speak about the first incident to the police. PW 4 has spoken about both the incidents. She has stated that the accused caused injury to the teeth of the deceased and the teeth of the deceased became loose. The learned Judge has observed that the medical evidence does not show that there was injury to the socket of the teeth or that the deceased's teeth were moving. Therefore, there appears to be exaggeration in Vimal's evidence. But even assuming that there was some quarrel between the accused and the deceased, it is not of such a nature as would lead to a murder. The motive alleged is a very weak motive.

34. In the circumstances of the case, in our opinion a doubt is created whether the deceased had in fact seen the accused. Even if the evidence of the doctor as regards deceased's physical and mental condition being satisfactory is accepted, even if the Special Executive Magistrate's evidence is accepted and the dying declarations are held to be voluntary they do not lead to the conclusion that the accused are the perpetrators of the crime

because the deceased has not said that she had seen the actual pouring of rockel and setting her on fire by the accused. She has said that she saw them only when they were running. No independent witness has been examined by the prosecution as regards the alleged oral dying declarations. We, therefore, feel that it is extremely difficult to confirm the order of conviction and sentence on such evidence. In our opinion, the accused will have to be given benefit of doubt and acquitted. Hence the following order:

. The impugned judgment and order dated 31.3.99 passed by IVth Addl. Sessions Judge, Satara is quashed and set aside. Conviction and sentence of accused 1 Raghunath Daulati Ghadge and accused 2 Suman Raghunath Ghadge under the impugned judgment and order is set aside.

. We are informed that accused 1 Raghunath Ghadge is in jail. He is ordered to be released forthwith unless otherwise required in some other case.

. Accused 2 Suman Raghunath Ghadge is on bail. Her bail bonds stand cancelled.

. Both the appeals are disposed of.

(SMT. RANJANA DESAI,J.)

(D. G. KARNIK, J.)

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CORAM:-SMT. RANJANA DESAI &

D. G. KARNIK, JJ.

DATED:- 6/3/2006

OPERATIVE PART OF ORDER:

. For the reasons recorded separately this Court has passed the following order:

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(SMT. RANJANA DESAI,J.)

(D. G. KARNIK, J.)

. The case of the prosecution is that on the day prior to the incident in question at about 1 pm. near the public water tap there was a quarrel between daughter of accused 2 and daughter of the deceased. PW 3 Jijabai who had come their told them not to quarrel and she went away. On the same day at about 5 p.m. the accused were again quarrelling with the deceased near the house of the accused. PW 3 Jijabai saw accused 1 and 2 beating the deceased. PW 4 Vimal, the sister of PW 2 Tatyaba was also there. She also tried to intervene. There was a scuffle. PW 4 Vimal,

Banubai and others intervened and rescued the deceased.

. According to the prosecution at about 1 to 1-30 p.m. on 10/10/1997 PW 2 Tatyaba, the brother-in-law of the deceased was in his house. He heard the commotion from the house of the deceased. He rushed there. He found that the house was latched from outside. His sister Vimal and Banubai were also there. Tatyaba tried to open the door by kicking it. However, he found that the door was latched from outside. He removed the latch and went inside. He found that the deceased was in flames. His sisters put blanket on the deceased. The fire was extinguished. Deceased was brought in the veranda. According to the prosecution the deceased told Tatyaba that accused 1 and 2 had poured kerosene on her and set her on fire. Tatyaba went to Bambavade and he brought the jeep. The deceased was shifted to Civil Hospital, Satara.

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. PW 8 Baburao Mohite, Executive Magistrate was contacted. He came there. He met medical officer PW 7 Dr. Deshpande and asked him whether the deceased was in a fit condition to give the statement. Dr. Deshpande opined that the deceased was in a conscious state and in a fit condition to give statement. He then took down the statement which is at Exhibit-38. This statement was

recorded between 11-25 a.m. to 11-45 a.m. on 9/11/97. In this statement the deceased reiterated that accused 1 and 2 had poured kerosene on her and set her on fire and she saw this while they were running away.